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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

JENNIFER ARMSTRONG,

Plaintiff and Respondent,

v.

MICHAEL J. BERGIN,

Defendant and Appellant.

B200985

(Los Angeles County
Super. Ct. No. BC330725)

APPEAL from post-judgment orders of the Superior Court of Los Angeles County. Jon M. Mayeda, Harold I. Cherness and Ruth Ann Kwan, Judges. Affirmed.

Doherty & Catlow, John Doherty and Paul Sowa for Defendant and Appellant.

Robert A. Kahn for Plaintiff and Respondent.

INTRODUCTION

On July 16, 2004, plaintiff/respondent Jennifer Armstrong (“Armstrong”) was struck by a motor vehicle driven by defendant/appellant Michael J. Bergin (“Bergin”). The accident occurred at the intersection of Crescent Heights Blvd. and Fountain Ave. in West Hollywood, California. A verdict was returned after trial by jury in favor of Armstrong and judgment was entered accordingly.

This appeal pertains to post judgment orders for attorneys fees awarded to Armstrong under section 1021.4 of the Code of Civil Procedure (hereafter “CCP”) and the trial court’s ruling against Bergin pertaining to his CCP section 998 settlement offer.

Bergin contends on appeal that the post judgment award of fees to Armstrong pursuant to section 1021.4 of the CCP was erroneous because under proper interpretation and construction the statute is inapplicable; the judge who ruled on the motion was not the trial judge; only a small portion of the evidence and record was considered by the trial court who failed to explain the basis for the ruling; his pre-trial 998 offer should have been granted because it was certain enough to be enforced; and the offer exceeded the judgment, thereby making him the prevailing party.

For the reasons hereafter given, we affirm the orders of the trial court.

FACTUAL AND PROCEDURAL SYNOPSIS

Armstrong’s original complaint filed on March 23, 2005.

Armstrong’s action was filed as one for damages suffered by her when she was struck by a vehicle driven by Bergin as she crossed the intersection of Fountain and Crescent Heights in West Hollywood on July 16, 2004. Armstrong’s original unverified complaint was filed on March 23, 2005, and contained allegations that she suffered personal injuries and property damages as a result of being struck in the crosswalk through the negligence of Bergin. Armstrong claims she suffered wage loss, loss of use of property, hospital and medical expense, general damage, property damage, loss of

earning capacity and other damage according to proof. Armstrong's complaint was a form complaint filed as an unlimited civil case based on a claim which exceeded \$25,000.

Bergin's answer to unverified complaint, filed on June 23, 2005.

Bergin filed his answer to the unverified complaint of Armstrong on June 23, 2005, containing a general denial plus six affirmative defenses based on comparative negligence, assumption of the risk, failure to state sufficient facts, comparative negligence of others, requiring Bergin to suffer liability based only upon his proportion of the total negligence of all persons involved in the accident; requesting leave of court to compare his negligence with others on ascertainment; protection under the Fair Responsibility Act of 1986, commonly known as Proposition 51, which Bergin contends limits his exposure to pay for non-economic damages only; that joint and several liability be determined not to apply in the action; and protection under Proposition 213 because Armstrong was not covered by liability insurance, thus limiting her to economic damages.

Armstrong's first amended complaint, filed on December 9, 2005.

On December 9, 2005, with leave of court, Armstrong filed an unverified first amended complaint which is the operative complaint in these proceedings. The first amended complaint is hereafter referred to as the "FAC" unless context requires otherwise. The FAC, in essence, merely restates the allegations of Armstrong's original complaint, with one important difference. Armstrong seeks punitive damages based upon Bergin's conviction in the criminal court of felony drunk driving at the time he injured Armstrong. Armstrong alleges that Bergin was guilty of malice, fraud and oppression as defined in section 3294 of the Civil Code (hereafter "CC"), thereby entitling her to punitive or exemplary damages, in addition to her actual damages. In support of her claim for punitive or exemplary damages, Armstrong alleges:

"At the time of the subject accident defendant Michael Bergin was driving a motor vehicle while under the influence of alcohol. Such conduct is in wanton disregard for the rights and safety of others. Taylor v. Superior Court (1979) 24 Cal.3d 890, 598 P.2d 854, 157 Cal Rptr. 693."

Bergin's answer to first amended complaint, filed on April 3, 2006.

Bergin filed his answer to the FAC and essentially realleged his general denial and all of the affirmative defenses set forth in his answer to the original complaint, but with the following additions: An affirmative defense was added denying that punitive or exemplary damages could be awarded in this instance, for failure of Armstrong to state a claim upon which such damages could be awarded. Bergin further alleged that even if he was found to be driving under the influence, Armstrong's injuries were neither enhanced nor exacerbated by his condition at the time of the accident and finally the accident was not caused by any impaired driving on the part of Bergin.

Armstrong's pre-trial request for judicial notice, filed on July 19, 2006.

Prior to trial, Armstrong filed a request for judicial notice on July 19, 2006. The trial court was asked to take judicial notice of the criminal proceedings involving Bergin in the case of People of the State of California v. Michael John Bergin, Case No. SA053818, and all the documents contained in the case. Armstrong represented she would submit certified copies of the documents at time of trial.

Armstrong's pre-trial request for judicial notice, filed on October 10, 2006.

On October 10, 2006, still pre-trial, Armstrong filed her request for judicial notice once again of the criminal case against Bergin and attached certified copies of the following documents emanating from the criminal action: "1. Felony Complaint; 2. DUI Advisement of Rights, Waiver and Plea Form (Vehicle Code Section 23153); 3. Minute Order Dated March 10, 2005; and 4. Transcript from March 10, 2005 hearing." The criminal case documents that Armstrong requested judicial notice of indicated that Bergin was charged with two felony counts under the Vehicle Code, namely Vehicle Code section 23153, subdivision (a) and Vehicle Code section 23153, subdivision (b). Both counts contained special allegations under Penal Code section 12022.7, subdivision (a), setting forth the terms of imprisonment for persons inflicting great bodily injury while committing or attempting a felony. The criminal case records reveal that Bergin withdrew his plea of not guilty to count 1, entered a plea of no contest to count 2, and count 1 was dismissed pursuant to a negotiated disposition. The criminal case records

further reveal that the court found Bergin guilty on count 2, but suspended imposition of sentence by placing Bergin on probation subject to terms and conditions set forth in the court's minute order dated March 14, 2005.¹ One of the conditions pertained to a victim's future restitution order.

Trial proceedings.

The jury trial commenced on November 2, 2006, with impaneling of the jury on November 8, 2006. On November 21, 2006, after several days of testimony, counsel argued the case and the jury was instructed. Following deliberations by the jury, the jury returned its verdict on November 27, 2006. Judgment on the verdict was entered in favor of Armstrong on January 31, 2007. Judge Mayeda retired from the bench on April 13, 2007.

At trial, evidence was adduced summarized in truncated format according to this court's understanding as follows: Bergin was driving his truck or SUV eastbound on Fountain, went into the left turn pocket and made a left turn to go northbound on Crescent Heights; the impact occurred in the crosswalk across Crescent Heights at the north portion of the intersection; Armstrong was wearing inline skates and was skating westerly in the crosswalk; before proceeding into the crosswalk, Armstrong and other members of her inline skating group, Daniel Benveniste, Tim Huber, Scott Palleiko and Lila Mahar had been at the northeast corner of the intersection; the intersection is controlled by a traffic signal; a driver who enters the eastbound left turn pocket on Fountain passes over sensors that trigger the traffic signal; the signal for eastbound traffic, if red at the moment a driver passes over the sensors will soon display a green left turn arrow; after 4 seconds, the green arrow changes to a yellow arrow; and after a brief time the yellow arrow changes to a green circular light.

¹

Pursuant to Evidence Code section 452, subdivision (g), the trial court further judicially noticed that Fountain Ave. runs east and west and that Crescent Heights Blvd. runs north and south.

When the skaters came to the northeast corner of the intersection, the light was red for Fountain; none of the skaters left the corner to proceed westerly into the crosswalk until the white hand “walk” signal came on for their direction; the skaters were at the corner at approximately 11:00 p.m.; Armstrong had a passion for skating and did it as much as she could for fun and recreation, which included competing in races; Armstrong was the first to leave the corner; she was a fast skater and leader; she entered the intersection waving and smiling at Officer Pulsipher, who was inside his vehicle; she did not look in Bergin’s direction and never saw his vehicle before impact; she testified that she is pretty sure she looked toward the intersection because she usually does; co-skaters Huber and Benveniste testified they did not see Bergin’s vehicle until right before the impact; Bergin perceived a danger and slammed on his brakes; his vehicle came to rest in the crosswalk; Officer Pulsipher also testified the vehicle came to rest in the crosswalk but some evidence showed it came to rest at some point beyond the crosswalk; Armstrong maintained the light had already turned to a green circular light before Bergin passed over the sensors; that Bergin did not trigger the left turn arrow and Bergin entered the intersection on the green circular light; although Armstrong had retained an accident reconstruction expert, one Michael Varat, he was not called to testify.

Bergin maintained he slowed down as he approached the intersection; the green arrow appeared as he entered the intersection on the green arrow, without stopping his vehicle; he made the left turn at normal speed; the signal turned yellow as he was in the process of making the turn; the signal turned to a green circular light while he was still in the intersection; Bergin called an accident reconstruction expert in the person of one Tom Fugger and a human factors expert, one Anthony Stein, whose credentials included a Ph.D. Stein corroborated Bergin’s testimony as to how the accident happened.

LAPD Reserve Officer Kevin Pulsipher was in a vehicle stopped at a red light at the north end of the intersection watching everything; Bergin’s vehicle was stopped at the crosswalk at the west end of the intersection, just before Bergin entered it; Bergin then started up and proceeded into the intersection where he stopped again; Bergin then started up again and made his left turn.

Pulsipher estimated it took 5-10 seconds for Bergin to go from his stopped position at the west end of the intersection to the middle of the intersection; another 2-3 seconds elapsed during which Bergin was stopped in the middle of the intersection before proceeding to make his left turn; Pulsipher admitted he had no faith in his time estimates; another witness testified he saw Pulsipher pulling up to a stop when the accident occurred.

The “walk” signal for Armstrong’s direction lasted for 7 seconds; co-skater Huber testified Armstrong has one trick and that is to go fast; Huber estimated it took Armstrong 1-2 seconds to go from the street at the corner to the point of impact; experts Fugger and Stein concluded it took Armstrong 2-3 seconds to go from the curb to the point of impact.

Co-skater Palleiko said Bergin had been stopped in the intersection for at least 15-45 seconds before completing his turn; one witness maintained that Armstrong was going slow and that it was not a race.

Co-skater Lila Mahar testified that the other lanes of cars going eastbound on Fountain were stopped for awhile before the accident.

Bergin’s alcohol use.

L.A. Sheriff Deputy William Dunkin conducted the investigation; upon arrival at the scene Bergin was in his vehicle, uncooperative and initially refused to exit his vehicle; when Bergin got out he refused to make a statement; he had an odor of alcohol on his breath; his eyes were watery and bloodshot; his speech was slurred; he almost fell 3 times in reaching the curb; Dunkin had to grab him; he refused to take a field sobriety test; at the sheriff’s station he refused to take a breathalyzer test; Dunkin took Bergin to the hospital where a blood test was administered; the blood test indicated a blood alcohol content of .13.

Officer Pulsipher said he had experience in doing some DUI investigations. After the accident he talked with Bergin; he concluded Bergin was not acting impaired or drunk.

Deputy Sam Young had operated the DUI car for the West Hollywood Sheriff's Station for at least 2 years; upon arrival at the scene he came upon Bergin sitting in his car; he saw no signs at all of Bergin being impaired or under the influence.

Lt. Smith was Deputy Dunkin's supervisor; upon arrival at the scene he heard slurred speech; he thought Bergin was under the influence; in his deposition testimony, however, he maintained that he did not think Bergin was under the influence.

All four of Armstrong's co-skaters testified at time of trial; no questions were asked of them about Bergin being under the influence; out of 8 witnesses, excluding Armstrong and Bergin, Deputy Dunkin was the only one who opined without contradiction that Bergin appeared to be under the influence; none of these witnesses saw the accident; Bergin maintained that his perception-reaction time allowed him to apply the brakes and stop his vehicle within the crosswalk; that a personal telephone call by Dunkin within his patrol car with Bergin in the back seat indicated that Bergin was not impaired.

Bergin testified that earlier in the day at approximately 4:00 p.m. Bergin met with some friends; they took a limousine to the Angel's game in Orange County; Bergin estimated that on the way to the game, at the game, and on the way back, he drank a total of 8 beers plus one drink of vodka and Red Bull; he had only one drink on the way back; Bergin told officers he had 3 vodkas; Bergin got into his own vehicle after arriving back and began his trip home to the San Fernando Valley.

One Darrell Oliver Clarady maintained that Bergin's BA level was equivalent to someone drinking 18-20 beers or 20 or more shots of vodka; he was of the opinion that Bergin was impaired by his alcohol use; Clarady was impeached with his testimony from another case in which he said someone was not impaired from alcohol use unless his BA level is between .15 and .30.

Human factors expert Anthony Stein, was of the opinion that Bergin was not impaired from alcohol at the time of the accident; he applied his brakes and came to a stop once danger appeared; there is a difference between being "under the influence" and

“impaired”; “impairment” would cause Bergin’s reactions to slow down and his ability to detect slows down; if impaired he would have just run over Armstrong, but he did not.

Armstrong’s injuries and recovery.

Armstrong suffered a fracture of the tibial plateau of her left leg; an initial operation occurred a few days after the accident; she had physical therapy for a time and was out of work for 6 weeks; Dr. Brian Solberg, Armstrong’s orthopedic surgeon believes he did “a bang up job” repairing the leg; Armstrong had “a really good recovery,” “a great recovery”; no future arthritis is anticipated as a result of the injury; 6 months after the accident Armstrong was again competing in inline skating races; he could not opine that Armstrong would have future medical problems but he estimated to a reasonable medical probability future problems would be at 10 percent; 9 months after the accident Armstrong underwent a second procedure during which the hardware was removed from her leg; Dr. Solberg did not treat Armstrong thereafter but did consult with her in preparation for trial.

Stipulation pertaining to Bergin’s nolo contendere plea.

It was stipulated in this civil trial that Bergin pled nolo contendere to a count of violating Vehicle Code section 23153, subdivision (b); a negligence per se instruction was given to the jury in the form of CACI No. 419, without mentioning the word felony;²

²

The instruction given read as follows: “California Vehicle Code Section 23153(b) states: [¶] It is unlawful for any person, while having 0.08 percent or more, by weight, of alcohol in his or her blood to drive a vehicle and concurrently do any act forbidden by law or neglect any duty imposed by law in driving the vehicle, which act or neglect proximately causes bodily injury to any person other than the driver. [¶] A violation of this law has been established and is not an issue for you to decide. [¶] However, you must decide whether the violation was excused. If it was not excused, then you must decide whether the violation was a substantial factor in harming Jennifer Armstrong. [¶] If you decide the violation was a substantial factor, then you must find that Michael Bergin was negligent.”

no mention was made to the jury of any enhancement under Penal Code section 12022.7, subdivision (a); no other documents from the criminal case were admitted into evidence.

Verdict and judgment.

On November 27, 2006, the jury returned its verdict, in which both Armstrong and Bergin were found to have been negligent and the legal cause of Armstrong's injuries; Bergin was found to have been 97 percent at fault and Armstrong was 3 percent at fault; the jury fixed damages for medical expenses at \$129,269.53; lost income at \$6,047.28; past pain and suffering at \$25,000; future pain and suffering at \$25,000; that Bergin had not acted with malice, fraud or oppression and the jury declined to enter a verdict for exemplary or punitive damages against Bergin.

Reductions in verdict amounts.

Relying on *Hanif v. Housing Authority* (1988) 200 Cal.App.3d 635, Bergin made a motion to have the medical expenses reduced to reflect the amount actually paid by Armstrong's health insurer and Armstrong herself under co-payments and/or deductibles. Upon granting the motion, the court reduced the amount of medical damages awarded to \$36,744.24. After correcting a small error in the award for lost income from \$6,047.28 to \$6,017.28 and reducing non-economic damages for pain and suffering by 3 percent to \$48,500 for Armstrong's comparative fault, a total judgment for Armstrong was entered for \$91,262.02.

Bergin's liability carrier paid to Armstrong a total sum of \$95,253.95 representing principal and some post judgment interest, on May 14, 2007; a signed partial Acknowledgement of Satisfaction of Judgment was filed on May 24, 2007.

Post judgment motions.

Armstrong's motion for order that Bergin's 998 offer is unenforceable.

On January 29, 2007, Armstrong filed a motion for an order that Bergin's offer to settle pursuant to CCP section 998 was unenforceable. The matter was scheduled for hearing on February 28, 2007. After a series of oppositions and replies were filed, the court granted the motion solely on the ground that Bergin's 998 offer was too uncertain

to be enforced, relying on *Valentino v. Elliott Sav-On Gas, Inc.* (1988) 201 Cal.App.3d 692, 699.

Armstrong's motion to strike Bergin's memorandum of costs.

On February 14, 2007, Armstrong filed a motion to strike Bergin's memorandum of costs on the ground that Bergin had not been the "prevailing party" at trial. Bergin filed opposition to the motion. Relying on the fact that Bergin's 998 offer had been declared by the court to be unenforceable, Armstrong's motion was granted.

Bergin's motion to strike/tax Armstrong's memorandum of costs.

On March 7, 2007, Bergin filed a motion to strike/tax Armstrong's memorandum of costs which Armstrong did not oppose by written opposition. Judge Mayeda issued a "tentative" order, stating his intent to tax certain claimed items of costs on April 5, 2007.

Bergin's motion for written orders.

On July 2, 2007, Bergin filed a motion for a final ruling and entry of order pertaining to his motion to tax Armstrong's costs which had been heard on April 5, 2007. Armstrong filed no opposition. On July 26, 2007, Judge Ruth A. Kwan granted Bergin's motion based upon Judge Mayeda's April 5, 2007 tentative ruling and struck certain costs claimed by Armstrong resulting in approved costs of \$11,639.59. A written order was signed.

Armstrong's motion for attorney's fees.

On April 13, 2007, the last day that Judge Mayeda was still on the bench, Armstrong filed her motion for an award of attorney fees pursuant to section 1021.4 of the CCP, noticing a hearing date of May 18, 2007. Oppositions and replies were filed by the parties. The motion was heard on May 18, 2007 by Judge Harold I. Cherness, temporarily assigned to Department 72 of the court. Judge Cherness granted the motion, awarding fees in the amount of \$90,000. Bergin contends Judge Cherness gave no explanation for his ruling other than to state that CCP section 1021.4 applied and that the amount awarded was \$90,000. The record contains a colloquy between the judge and counsel recognizing that the case had been tried before Judge Mayeda. Judge Cherness

stated, among other things, that “And I wish he [Judge Mayeda] were here.” On May 18, 2007 Armstrong served notice of entry of the May 18, 2007 order.

Notice of Appeal by Bergin.

On July 26, 2007, Bergin filed a timely notice of appeal; and an amended notice of appeal on July 30, 2007. Bergin *sweepingly* appeals from the following post-judgment orders of the superior court dated April 5, 2007, May 18, 2007, June 1, 2007, July 25, 2007 and July 26, 2007. However, this court is constrained to note that the gravamen of Bergin’s appeal pertains to the post-judgment orders of the trial court under sections 1021.4 and 998 of the CCP which had the effect of a substantial (\$90,000) award of attorney fees to Armstrong.

DISCUSSION

Applicability of CCP section 1021.4 to Armstrong’s claim for attorney fees.

We first examine the trial court’s ruling that Armstrong was entitled to an award of attorney fees under section 1021.4 of the CCP. In essence, the section provides for an award of attorney fees when the plaintiff prevails in a civil action against a defendant who has caused injuries to the plaintiff stemming from the commission of a felony. We find that requisites for application of the statute were established in this instance and the trial court did not commit error in so finding in its post-judgment orders for attorney fees in favor of Armstrong. Bergin, as a negotiated disposition, agreed to and did plead no contest to a violation of count 2 of the Vehicle Code. Both counts 1 and 2 were pled by the People as felonies, involving great bodily injuries. It is not necessary to give further explanation as to the effect of a “nolo contendere” plea. The law is well established. For all intents and purposes the law treats a no contest plea as tantamount to a plea of guilty. Accordingly, a plea of guilty admits all elements of the crime charged. This consequence is true even if the crime in question may be punished either as a felony or a misdemeanor and regardless of whether the defendant is sentenced to state prison. It is further well

ensconced in the law of evidence that such a plea is admissible as a party admission in a subsequent civil action. The criminal case documents relevant to the post-judgment orders were properly the subject of judicial notice by the trial court. We discern no error by the trial court in concluding that CCP section 1021.4 applied in this instance.

Bergin's challenge to the \$90,000 award of attorney fees to Armstrong as being unsupported by the record is equally without merit. It is well established that a trial judge is in the best position to evaluate the efforts of counsel in the prosecution of a civil lawsuit. The appellate court gives great deference to the trial court's determination of the value of the services rendered by trial counsel. It is true that the judge in this case, Judge Cherness, was relegated to making this value determination as the result of the retirement of Judge Mayeda before he signed the attorney fees order. However, Judge Cherness had portions of the records of the trial proceedings before him as indicated at oral argument in this appeal. It was the burden of counsel at trial to produce whatever remaining portions of the record they wanted the trial judge to consider. As an experienced judge, he easily could have, and more than likely did, extensively peruse and read the trial court record and Judge Mayeda's tentative ruling before making the attorney fees award. In the absence of evidence to the contrary, we give Judge Cherness the benefit of the established proposition that a judge is presumed to have performed his or her judicial function. We find no viable reason for not giving deference to the amount of the award in this instance. The \$90,000 award was well within the discretion of the trial judge and we decline Bergin's invitation to "second guess" the ruling of the trial court on a matter of discretion, particularly when the discretion is well supported by substantial evidence in the record.

Efficacy of Bergin's offer under section 998 of the CCP.

The trial court found that Bergin's 998 offer was unenforceable in this instance. The court found defects in Bergin's offer, similar to what this court found in *Valentino v. Elliott Sav-On Gas, Inc.*, *supra*, 201 Cal.App.3d 692. We further explain.

On June 28, 2006, almost one year prior to the entry of the restitution order in the criminal action, Bergin served Armstrong with an offer to settle under CCP section 998 worded as follows:

“Defendant offers to settle with plaintiff for the total sum of \$150,000, in exchange for a General Release from said plaintiff, and for dismissal, with prejudice, of all actions, including the ‘fraudulent conveyance’ action, under Case No. BC349169, and that it shall not act as a retraxit, to be executed by counsel for plaintiff.

“It should be noted that this offer is meant to include any Complaint-In-Intervention, if any, and is also meant to act as a waiver of any further claims by plaintiff to collect money under any restitution order made in reference to the criminal action brought against MICHAEL BERGIN.”

This offer to settle was not accepted by Armstrong and the ultimate judgment against Bergin was as set forth, *supra*, in the “Factual And Procedural Synopsis” portion of this opinion, which netted Armstrong a judgment in the amount of \$91,262.02.

In order to fully understand the ruling of the trial court which found that the offer was too uncertain to be enforced under section 998 of the CCP, some historical input about pending and possible future collateral proceedings involving this accident is in order.

Armstrong provides a general description of the allegations contained in her fraudulent conveyance action in the respondent’s brief.

Armstrong filed the fraudulent conveyance action on March 20, 2006. The action was based on allegations that, on December 16, 2004, five months after the accident with Armstrong and three months after his arrest, Bergin formed an entity entitled “Jesala Reds, LLC” and, on February 15, 2005, executed a Grant Deed transferring title to his personal residence, worth \$1,000,000, to Jesala Reds, LLC. In addition, on June 6, 2005, Bergin liquidated \$262,002.30 of his investments in his account at Linsco/Private Ledger and transferred \$244,535.28 of this to an account he opened in the name of Jesala Reds, LLC. In the fraudulent conveyance action, Armstrong sought damages for fraudulent transfer, including compensatory and punitive damages.”

Armstrong's allegations in her fraudulent conveyance action give rise to the observation and admonition of this court in the *Valentino* decision that we will not in effect find certainty in a 998 offer when the court is cast in the role of having to chase down every eventuality that could occur in litigation between the parties. We can only repeat that observation and admonition in this instance. We do not know the eventual outcome of the fraudulent conveyance action, just as we cannot anticipate the amount of the restitution order to be made by the court in the criminal action against Bergin. Further, we have no way to reasonably anticipate what Bergin was referring to by the use of the terms in his offer to include "any Complaint-in-Intervention, if any." Accordingly, we find no error in the ruling of the trial court that the offer to settle by Bergin was too uncertain to have efficacy in this instance.

DISPOSITION

The post-judgment orders of the trial court are affirmed. Respondent to recover costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WOODS, Acting P.J.

ZELON, J.

JACKSON, J.